United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1298

To be argued by
SHEILA GINSBERG

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

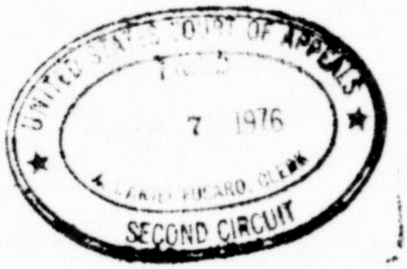
VINCENT ANTHONY MAGDA,

Defendant-Appellee.

Docket No. 76-1298

BRIEF FOR APPELLEE
VINCENT ANTHONY MAGDA

ON APPEAL BY THE GOVERNMENT
FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, Appellant, -against- VINCENT ANTHONY MAGDA, Defendant-Appellee.	Docket No. 76-1298

BRIEF FOR APPELLEE VINCENT ANTHONY MAGDA

ON APPEAL BY THE GOVERNMENT
FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

Pursuant to 18 U.S.C. §3731, the United States Government appeals from an order of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) filed on March 9, 1976, granting Vincent

Anthony Magda's motion to suppress, and from an order filed on June 8, 1976, granting in part and denying in part the Government's motion for re-argument and modification of the original order.

On September 25, 1975, appellee Vincent Anthony Magda was indicted in the Southern District of New York for robbery of the United Mutual Savings Bank, in violation of 18 U.S.C. §2113. Magda was also indicted for bank robberies in the Northern District of Illinois, the Eastern District of Louisiana, and the Southern District of Florida.

On March 29, 1976, during the pendency of the proceedings below, Magda pleaded guilty in the Northern District of Illinois to the indictment pending there and, pursuant to Rule 20 of the Federal Rules of Criminal Procedure, to the Louisiana and Florida indictments as well. On May 7, 1976, Magda was sentenced to a term of twenty years' imprisonment. He is currently incarcerated serving that sentence.

Statement of Facts

On September 25, 1975, appellee Vincent Magda was charged with the August 22, 1975, robbery of the United Mutual Savings Bank.[1] Asserting a violation of his Fourth Amendment rights, Magda moved to suppress a "demand note" found in his possession at the time of his arrest and all the evidence derived therefrom. After a full hearing, Judge Carter found that the initial police stop and seizure of Magda was unlawful because its primary motivation -- the fact that Magda, a white man, was observed in an innocuous exchange with a "black man" in what was described as a narcotics-prone area -- was insufficient to constitute reasonable suspicion.

The Judge then granted the motion to the extent that he suppressed the note, a custodial statement, and fingerprint evidence, but he denied the motion with respect to the proposed testimony of a bank teller[2] who the Government claimed

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[1]The indictment is annexed to the Government's separate appendix at A.4.

[2]In his March 9, 1976, order, Judge Carter had suppressed all of the Government's evidence. However, on the Government's motion for re-argument, Judge Carter modified that decision (order filed June 8, 1976) to the extent that he ruled that the bank teller's testimony was admissible. See infra at 13.

had already provided a detailed description of the robber.[3]

A. The Hearing[4]

The Government conceded at this hearing that if the investigative stop of Magda was illegal, all of the Government's evidence was tainted and inadmissible at trial (68[5]). However, the Government contended that the stop of Magda, although a seizure, was lawful because it was based on the reasonable suspicion required by Terry v. Ohio, 392 U.S. 1 (1968) (2).

The Government's only witness was New York City police officer Saverio Alesi, who testified to his version of the facts leading up to the September 5, 1975, arrest of Vincent Magda.

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[3]The description of the evidence appears in an affidavit of the Assistant U.S. Attorney accompanying the Government's motion for re-argument (see A.169-170).

[4]The hearing was held on November 26, 1975; it was subsequently reopened at Magda's request, and further testimony was taken on December 15, 1975.

[5]Numerals in parentheses refer to pages of the transcript of the hearing.

At the time of the arrest, Alesi had been on foot patrol for six months in the Midtown South Precinct, which extends from 29th to 45th Streets and from Ninth to Lexington Avenues (7). His previous experience as a foot patrolman had been eight years earlier in Brooklyn when he first joined the police force; during the intervening years he had served as a motorcycle policeman (13).

On September 5, 1975, at approximately 3:00 p.m., Alesi, on foot patrol since 8:00 a.m., was standing at the southwest corner of Eighth Avenue and 43rd Street (7-8). Alesi described the vehicular and pedestrian traffic at that time as "heavy," but "moderate" for that area (22). Alesi, who asserted no personal expertise regarding the character of the area on 43rd Street between Eighth and Ninth Avenues, testified that certain precinct bulletins described this area as "narcotics prone"[6] (18).

Alesi first spotted Magda already engaged in a conversation with, according to Alesi, a "male black" (18). Magda

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[6]Significantly, during Alesi's six-month tour of duty in the area, he had made no narcotics arrests and had observed a total of only two such arrests, the most recent some two months prior to September 5, 1975 (44). The record is silent as to the facts surrounding those arrests.

Similarly, it is silent as to the facts of the narcotics arrests Alesi claimed to have made personally in other areas of the city (13).

and his companion were standing on the north side of 43rd Street, fifteen to twenty feet from the Eighth Avenue corner, and a distance of thirty to thirty-five feet away from the patrolman (8). Alesi did not know Magda or the other man, nor did he recognize either as familiar.

As Alesi watched Magda and his companion he saw them exchange "something":

> I observed the defendant and the male black exchange something with each other. I couldn't see what it was. They just exchanged something.
>
> (9).

According to the witness, the exchange occurred with a simultaneous motion: Magda offered "something" with one hand and received "something" with the other (9). While at first Alesi maintained that the observed movement was Magda's left hand to his companion's right, and vice-versa, he later conceded that he didn't know whether or not it was right hand to right and left to left (21). Also, he did not observe which hand was used to give and which to receive (20). At one point point Alesi admitted that he never saw "anything" in either man's hands and that basically he just saw their hands touching (20).

The encounter completed, Alesi saw the "black" man look in his direction, turn, and walk westerly on 43rd Street[7] (9). Magda turned as well, but to his left, and walked southerly across 43rd Street, directly toward Patrolman Alesi, who was wearing his uniform (10, 20).

As Magda passed Alesi, the patrolman, who was armed, put his hand on Magda's shoulder and asked him to stop because he wanted to talk to him (10). Magda turned so that he faced Alesi, slowed his pace, and walked backward toward 42nd Street with Alesi walking forward alongside him (28). After moving approximately eight to ten feet in this fashion, both men came to a halt (31). Alesi asked Magda what had been going on, and Magda answered that "nothing" had (14). Alesi challenged Magda's denial and pursued the inquiry:

> I seen you do something with this black guy, across the street, exchange something, you know. What was it?
>
> (14).

According to Alesi, Magda then admitted that "he had bought a marijuana cigarette for a dollar," and produced the cigarette. After obtaining this admission, Alesi arrested Magda and searched him. The search uncovered an unloaded 9 mm. Browning automatic revolver and the note (13). Later that afternoon, an FBI investigation, concededly prompted by the note,

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[7] Subsequently Alesi amended his observation to the extent that he then characterized the "black" man's turning motion as "rapid," but he continued to characterize the "black man's" movement along 43rd Street as a "walk" (41).

produced an incriminating statement by Magda to the FBI agent. Subsequently, also as a result of the note, the investigation produced a positive fingerprint analysis.[8]

Magda's position at the hearing, presented through his own testimony (42-69), as well as through the testimony of Margaret Magda, his mother (94-105), and of Virginia Lees (72-93) and Patricia Dunbar (106-120),[9] his sisters, was that when stopped he did not admit to buying the marijuana cigarette, that Alesi found the marijuana only after he had searched Magda, and that the bank "demand note" was not discovered during the initial search, but only during a later search at the stationhouse.

Specifically, Magda testified that as he was walking South between 43rd and 42nd Streets on Eighth Avenue, Alesi grabbed his shoulder, forced him to a stop, and asked what Magda had given to that "black guy" (44-45). Then, according to Magda, Alesi grabbed the back of his jacket and pushed him back toward 43rd Street to look for the other man. Unable

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[8]The facts concerning the FBI investigation are set forth in the affidavit of the Assistant U.S. Attorney annexed at A.169.

[9]The testimony of Mrs. Magda, Mrs. Lees, and Mrs. Dunbar was presented on December 15, 1975, when the hearing was reopened at Magda's request.

to locate this person, Alesi then searched Magda and found the gun and the marijuana cigarette[10] (47).

According to Magda, he had had the marijuana for several days (53), and his encounter with the man on the corner of 43rd Street involved a request by this man for change for a quarter (50).

In rebuttal, the Government recalled Alesi, who reasserted that Magda himself produced the marijuana after having admitted to the purchase (126). In support of this testimony, the Government introduced certain entries in Alesi's memo book which related to this incident. The entries, made after Magda's arrest, provided in pertinent part:

> Observed one male white making buy from one male black at 43rd Street and Eighth Avenue, stopped male white, admitted he bought one marijuana cigarette for $1.
>
> (129).

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[10]Mrs. Magda, Mrs. Lees, and Mrs. Dunbar testified to their respective telephone conversations with Officer Alesi on the night of Magda's arrest. Each remembered that Alesi had said to them that the marijuana was found when Alesi searched Magda (75, 95, 108).

B. The March 9, 1976, Opinion: United States v. Magda, 409 F.Supp. 734 (S.D.N.Y. 1976).

Recognizing that the lawfulness of all that followed would be determined by the reasonableness of the stop, Judge Carter concentrated on the facts relied on to justify Alesi's preliminary interception of Magda.[11] The Judge found the following facts:

(1) Alesi was relatively inexperienced in the field of street arrests (409 F.Supp. at 739);

(2) Alesi had never before seen either Magda or the unknown black man and had no information from a reliable informant to support a suspicion that either was involved in drug transactions (ibid.);

(3) Alesi did not describe the exchange as furtive or say that either party made an attempt to conceal the substance that was changing hands (id. at 740);

(4) At the time Alesi observed the two men they could have been terminating a long conversation with an exchange

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[11] The basic factual disputes between Magda and Alesi related not to the stop but to the circumstances of the subsequent arrest: i.e., whether Magda produced the marijuana or Alesi found it after a search. As to these facts, Judge Carter concluded:

> I believe that Alesi's version of the events more exactly accords with what took place.
>
> 409 F.Supp. at 735.

of addresses, or they could merely have bumped into each other accidentally in taking leave of one another (id. at 739);

(5) Alesi never suggested that the black man ran or even walked rapidly away (id. at 740).

(6) After the exchange, Magda walked toward the police officer (ibid.);

(7) The reason for the stop was primarily that Alesi observed an exchange, albeit unknown, between a young black man and a young white man in an area of the city defined as "narcotics prone" (ibid.).

Judge Carter concluded:

> ... There is nothing in the record to show that it is more likely than not that narcotics dealing can be reasonably expected to generate this kind of encounter between a young white and a young black person than between two men of the same race, between two women, or between any two human beings of any different ethnic origin or class. Since apparently Alesi's sole justification for stopping the defendant and interrogating him was based on Magda having had some contact with a young black man, the specific articulable facts necessary to justify police interference with an individual on the public streets were lacking.
>
> (Ibid.)

Based on the law as it is applied in both the federal[12]

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[12]For federal authority, Judge Carter relied on United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968); United States v. Salter, 521 F.2d 1326 (2d Cir. 1975); United States v.

and New York State[13] courts, Judge Carter found that Alesi had failed

> ... to point to specific and articulable facts which, taken together with the rational inferences from these facts, reasonably warrant that intrusion.
>
> (409 F.Supp. at 740-741).

C. The Government's Motion to Re-Argue

Withdrawing its initial concession that the illegality of the stop would taint all of the prosecution's evidence, the Government moved to re-argue the motion on the ground that the exclusionary rule does not extend to preclude the admission of fingerprint evidence and the testimony of the bank teller. In his affidavit in support of the motion, the Assistant U.S. Attorney averred that the bank teller, who had not yet identified Magda, had given a detailed description of the robber which was strikingly similar to Magda.

The prosecutor also conceded that but for the uncovering of the demand note Magda would not have been a suspect in the

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(Footnote continued from the preceding page)

Santana, 485 F.2d 365 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974); United States v. Riggs, 474 F.2d 699, 703 (2d Cir.), cert. denied, 414 U.S. 820 (1973).

[13] For New York authority, the Judge relied on People v. Cantor, 36 N.Y.2d 106 (1975).

United Mutual Savings Bank robbery and that his fingerprints would not have been compared with the latent prints found in the bank (A.169-172).

D. Disposition of the Other Charges Pending Against Magda

On March 29, 1976, while the Government's motion for re-argument was pending, Magda pleaded guilty in the Northern District of Illinois to three indictments charging bank robberies in the Northern District of Illinois, the Eastern District of Louisiana, and the Southern District of Florida. On May 7, 1976, he was sentenced to a term of twenty years' imprisonment.

E. The Decision on Re-Argument

On June 7, 1976, Judge Carter ruled that the fingerprint evidence was inadmissible as a fruit of the illegal stop. Relying on this Court's opinion in United States v. Karathanos, 531 F.2d 26, 35 (2d Cir. 1976), the Judge found that the path leading from the primary illegality to the fingerprint evidence "may be long, but it is straight."[14] As to the testimony of the bank teller, the Judge found that it was admissible because she had not been located by exploitation of the illegal stop.

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[14]The District Court opinion on the motion to re-argue is annexed to the Government's separate appendix at A.175-181.

F. The Appeal

On June 9, 1976, the Government filed its notice of appeal pursuant to 18 U.S.C. §3731. The requisite certification that the evidence suppressed is substantial and that the appeal is not taken for delay was not filed until August 2, 1976.

ARGUMENT

Point I

BASED ON HIS SPECIFIC FINDINGS OF FACT, JUDGE CARTER WAS CORRECT IN CONCLUDING THAT OFFICER ALESI LACKED THE REQUISITE REASONABLE SUSPICION TO MAKE A LAWFUL INVESTIGATIVE STOP.

After a full and complete hearing spanning two days, the District Court found that the investigatory stop of Vincent Magda by Patrolman Alesi was unlawful. At the hearing all parties agreed, and Judge Carter so found, that the police officer's initial stop of Magda was a seizure protected by the requirements of the Fourth Amendment. United States v. Magda, 409 F.Supp. 734, 738 (S.D. N.Y. 1976). This finding, not contested by the Government on appeal (Br. at 10-14), is clearly correct. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16 (1968); Sibron v. New York, 392 U.S. 40 (1968); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973); United States v. Nicholas, 448 F.2d 622, 624 (8th Cir. 1971); United States v. Carter, 369 F.Supp. 26 (E.D.Mo. 1974). Most recently, in United States v. Brignoni-Ponce, supra, the Supreme Court declared unlawful a vehicle stop by the roving Border Patrol which sought only to ask the car's occupants about their citizenship:

> The Fourth Amendment applies to all seizures of the person, including seizures

> that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 16-19 (1968).
>
> United States v. Brignoni-Ponce, supra, 422 U.S. at 878.

Earlier, the Court in Terry v. Ohio, supra, found that a stop protected by the Fourth Amendment occurs

> ... whenever a police officer accosts an individual and restrains his freedom to walk away ...
>
> Terry v. Ohio, supra, 392 U.S. at 16.

"Restraint," the Court made clear, could be accomplished by a show of authority as well as by physical force. Terry v. Ohio, supra, 392 U.S. at 19, n.16.

Applying these principles, in United States v. Nicholas, supra, 448 F.2d at 624, the Eighth Circuit held that even though the defendant was physically free to drive away, the police officers' action in stationing themselves on either side of his car and the flashing of their badges was a sufficient show of authority to amount to a seizure. See United States v. Davis, 459 F.2d 458 (9th Cir. 1972).

The stop in this case was certainly more restrictive: as Magda was walking south on Eighth Avenue, he was approached by Patrolman Alesi, armed and in uniform. Alesi put his hand on Magda's shoulder and told him to stop. When Magda attempted to continue walking, albeit at a slower pace, Alesi pursued him and eventually brought him to a halt.

Acknowledging that this stop was a seizure, the Government contended that it was constitutionally reasonable. On appeal, the Government seeks reversal of the District Court finding to the contrary on the grounds that (1) the trial judge incorrectly assessed the legality of the stop in terms of New York State, rather than federal, law, and (2) application of the federal standards would have established that the stop was lawful.

The Government's first contention is an obvious red herring. The issue before Judge Carter was whether the seizure complied with the strictures of the Fourth Amendment. In reaching his decision that it did not, the Judge explicitly applied the constitutional standards enunciated by the Supreme Court in United States v. Brignoni-Ponce, supra, 422 U.S. 873; Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, supra, 392 U.S. 1; and Sibron v. New York, supra, 392 U.S. 40. Also considered were the opinions of both the federal courts and the courts of New York State dealing with the question of what facts constitute a reasonable stop under the Fourth Amendment.[15] Finding that the

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[15]In the federal area, Judge Carter explicitly considered the very cases the Government relies on: United States v. Salter, 521 F.2d 1326 (2d Cir. 1975); United States v. Santina, 485 F.2d 365 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974); United States v. Riggs, 474 F.2d 699, 703 (2d Cir.), cert. denied, 414 U.S. 820 (1973).

federal and state cases are consistent on this issue, and therefore guided by the logic of all these authorities, the court below found that the stop here was unreasonable.

Review of the District Court's analysis of the Fourth Amendment requirement and the findings of fact in this case reveals the fallacy in the Government's second contention that application of federal law would somehow validate the search.

The opinion below (407 F.Supp. at 739-740) makes clear that in order for an investigatory stop to be lawful, the police officer must have a reasonable suspicion that the suspect participated in criminal activity. United States v. Brignoni-Ponce, supra. The test is whether the officer can

> ... point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion.
>
> Terry v. Ohio, supra, 392 U.S. at 21.

Judge Carter found that Patrolman Alesi's conduct failed the test because when he stopped Magda he was acting on a mere hunch rather than on the "particular" and "articulable" facts necessary to justify the intrusion. In reaching this conclusion, the trial judge, who heard all the testimony below, specifically rejected four of the five factors now relied on by the Government to validate the stop.[16]

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[16]In its brief at 11, the Government argues that Alesi's conduct was justified in light of the character of the area

With regard to Alesi's personal experience, the trial judge found that he was a relatively inexperienced foot patrolman who had little firsthand exposure to the narcotics trade in the 43rd Street area. This assessment was accurate since Alesi's primary experience had been as a motorcycle policeman in another part of the city -- he had been on foot patrol in the 43rd Street area for only six months. Moreover, despite the designation of this area as "narcotics-prone," the fact is that during this six-month period, Alesi had made no narcotics arrests and had observed only two such arrests made by other officers. Significantly, those two arrests and the arrests Alesi claimed to have made personally in other parts of the city provide no basis for assuming that he had a special expertise in detecting this type of narcotics transaction. The absence in the record of the facts upon which those arrests took place render the success of those arrests non-probative of Alesi's particular ability

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(Footnote continued from the preceding page)

he was patrolling, his own experiences as a policeman, the exchange he observed, the immediate parting when the exchange was concluded, and the more rapid departure of Magda's companion.

to evaluate the innocent actions he observed here. United States v. Mallides, supra, 473 F.2d at 861-862.[17]

With regard to the character of the observed exchange, the trial judge found that it was indeed innocent. When Alesi first spotted Magda, Magda was already engaged in conversation with the other man. Consequently, Alesi had no way of knowing how long the men had been talking and whether, in fact, he was witnessing the end of a lengthy conversation between two old friends. Moreover, there was nothing furtive about the exchange. It was made at three o'clock in the afternoon in the middle of a street in plain view of "heavy" pedestrian and vehicular traffic. Obviously, the exchange of "something" in these circumstances was more likely to be, as Judge Carter found, the exchange of addresses. The touching of hands might just as well have been a sign of departing friends, and the parting after such an exchange was therefore appropriate rather than suspicious.

The Judge also rejected the Government's final assertion that Alesi had observed Magda's companion flee to avoid apprehension. All Alesi could assert was that the "black

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[17]In United States v. Mallides, supra, the absence of proof of factual similarity resulted in the Ninth Circuit's rejection of a government contention that twenty to thirty previous arrests in an area created a "special expertise." Moreover, the court pointed out, in terms appropriate to this case, that prior experience could not establish expertise unless there was also proof of the number of unlawful detentions which resulted on similar facts.

man" looked in his direction, turned rapidly, and walked away. This record does not even establish that the unknown man actually saw Alesi, who was standing some thirty-five feet away across a crowded and busy street. In addition, despite the "rapid" turning, the critical fact, and Judge Carter so found it to be, was that this man did not run, but rather walked away.[18]

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[18]As a general matter, "furtive gesture" evidence is singularly unreliable. In language particularly appropriate here, the California Supreme Court, in People v. Supreme Court of Yolo County, 478 P.2d 449, 455 (1970), explained why such evidence should not be relied upon:

> The difficulty [with inferences from furtive gestures] is that from the viewpoint of the observer, an innocent gesture can often be mistaken for a guilty movement. He must not only perceive the gesture accurately; he must also interpret it in accordance with the actor's true intent. But if words are not infrequently ambiguous, gestures are even more so. Many are wholly nonspecific, and can be assigned a meaning only in their context. Yet the observer may view that context quite otherwise from the actor: not only is his vantage point different, he may even have approached the scene with a preconceived notion -- consciously or subconsciously -- of what gestures he expected to see and what he expected them to mean. The potential for misunderstanding in such a situation is obvious.

See also United States v. Mallides, supra, 473 F.2d at 861; United States v. Davis, supra, 459 F.2d at 459.

Although nowhere apparent from the Government's brief, there were other critical facts upon which Judge Carter actually relied in evaluating the justification for the stop. Specifically, the Judge found that Alesi did not know or recognize Magda or his companion; nor did Alesi have information to indicate that either man was involved in drug trafficking.

Further, the Judge found that Magda's conduct in crossing the street and walking directly toward the uniformed patrolman -- in fact, within arms' length of him -- was probative of innocent behavior.[19]

Finally, the Judge found that, in light of the innocent character of all that Alesi observed, the primary fact that triggered Alesi's stop of Magda, who is white, was that the companion with whom he was speaking was a black man. This finding was reinforced by Alesi's persistent use of the words "male black" throughout his testimony, as well as in his memo report. Alesi's constant references to race suggest that for him the racial factor was significant in motivating him to stop Magda.

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[19] Compare People v. DeBour, ___ N.Y.2d ___ (June 15, 1976), where the defendant's attempt to avoid an encounter with uniformed police was considered significant.

Judge Carter correctly held that there is nothing about the innocent interaction between an unknown white man and an unknown black man in a narcotics-prone area which makes it susceptible to the inference that something criminal is afoot. See United States v. Nicholas, supra, 448 F.2d at 625; see also People v. Tinsley, 48 A.D.2d 779 (1st Dept. 1975) (Steven, J., dissenting), reversed on the dissenting opinion, ___ N.Y. 2d ___ (July 15, 1976).

In this context, Sibron v. New York, supra, is particularly significant. In Sibron, 392 U.S. at 45 and 62, the Supreme Court found insufficient to justify a stop the fact that the defendant was seen in brief conversations with no fewer than eleven known narcotics addicts in a narcotics-prone area.[20] The clear message of Sibron for this case is that innocent behavior in a high crime area will not amount to reasonable suspicion.

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[20]Incredibly, the Government argues (Brief at 13) that Sibron dictates reversal here because an observed exchange absent there is present in this case. The argument is disingenuous.

The fact that distinguishes Sibron from this case and makes this case an even stronger one for suppression is that here Magda and his companion were completely unknown to the officer. Here, unlike the case in Sibron, there was nothing to suggest that narcotics might be the subject of the encounter. Consequently, the fact that here Alesi did observe an exchange of "something" is completely lacking in the significance such an exchange might have had in Sibron.

Not surprisingly, the lower courts have declined to imbue innocent conduct with the requisite aura of suspicion just because it occurs in a high crime area.[21] For example, in United States v. Mallides, supra, 473 F.2d 859, the Ninth Circuit invalidated a car stop where the officers testified that they suspected the transportation of illegal aliens when they observed in the car in a border area six Mexican-appearing men who sat stiffly and who did not look at the patrol car as it passed.

United States v. Davis, supra, 459 F.2d at 459, is particularly in point. There, the court of appeals found reasonable suspicion lacking where, in front of motel known to be frequented by narcotics addicts, the officers observed four men standing with the defendant, who was having trouble keeping his balance. The officers also noticed that all of

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[21]As Judge Carter found here, the cases in this Circuit are not to the contrary. In United States v. Salter, supra, 521 F.2d at 1328, the defendant, two miles from the Canadian border, was accompanying two women who, when questioned by the Border Patrol about their place of birth, told an obvious and outrageous lie to which Salter did not react. In United States v. Santana, supra, 485 F.2d at 368, the agents observed a known narcotics dealer as he patronized a restaurant known to be frequented by narcotics dealers and emerged carrying a brown paper bag, which "has long been established as a sort of hallmark of the narcotics business."

Also inapposite are United States v. Hall, 525 F.2d 857 (D.C. Cir. 1976), and United States v. Mayes, 524 F.2d 803 (9th Cir. 1975), cited by the Government in its brief at 14. In Hall, the police observed a secretive exchange and attempt to depart made after the defendant was aware of the presence of the police; in Mayes, the defendant was observed within two miles of the border, obviously having spent the night in the brush.

the men turned to look at the police car as it passed. See United States v. Nicholas, supra; United States v. Bell, 383 F.Supp. 1298 (D.Neb. 1974); United States v. Carter, supra, 364 F.Supp. 26.

In the instant case, on the facts as the trial judge found them to be, Alesi lacked the requisite reasonable suspicion. All he observed was an innocent encounter between a white man and a black man in a high crime area. The observation occurred during daylight hours at 3:00 p.m. in the middle of a busy thoroughfare. Alesi was not investigating a specific crime and he did not know or even recognize Magda or his companion. Nothing this companion did was probative of guilt, and everything Magda did was indicative of innocence. Moreover, Alesi was found to be relatively inexperienced as a foot patrolman, so there was every reason to reject the Government's allegation that he possessed the extrasensory perceptions necessary to detect that what he observed between Magda and his companion was a criminal activity.

Judge Carter was correct when he found the stop unlawful:

> ... A brief stop for questioning is surely not the greatest indignity a person can suffer, see United States v. Riggs, 474 F.2d 699, 703 (2d Cir.), cert. denied, 414 U.S. 820, 94 S.Ct. 115, 38 L.Ed.2d 53 (1973); but it is a seizure of the person and should not be initiated by a law enforcement officer because of a vague hunch or notion, unsupported by articulable facts, that criminal activity is happening, has

happened or is about to happen.

United States v. Magda, supra, 409 F.Supp. at 740.

The opinion below must be affirmed.

Point II

THE FINGERPRINT EVIDENCE, TAINTED BY THE UNLAWFUL STOP, WAS PROPERLY SUPPRESSED.

The Government was initially correct when it conceded at the hearing below that the fingerprint evidence was a fruit of the investigatory stop. The fingerprint evidence was the direct and immediate product of the bank demand note found after Alesi's unlawful stop. Prior to that time Magda had not been a suspect in the robbery and his fingerprints, although on file with the FBI, would never have been compared, but for finding the demand note, with the latent prints found in the bank after the robbery. The fingerprint evidence was obtained solely because the FBI agent who interrogated Magda after the stop recognized the similarity of the note found in his possession with the note used in the holdup of the United Mutual Bank.

The positive fingerprint analysis is therefore a direct result of the unlawful stop, and consequently must be suppressed. Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber

Co. v. United States, 251 U.S. 389 (1920); United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976).

Two basic principles define the area of suppression and compel this result. In Silverthorne Lumber Co. v. United States, supra, Mr. Justice Holmes made clear that suppression is not limited to the evidence actually found during the primary illegality:

> The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the court but that it shall not be used at all.
>
> Id., 251 U.S. at 392.

In Wong Sun v. United States, supra, the Supreme Court articulated the secong principle to explain that the analysis is not simply a "but for" test, but rather a determination of the use made or significance of the "primary illegality" in uncovering the objected to evidence:

> ... We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come by at exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).
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> Wong Sun v. United States, supra, 371 U.S. at 487-488.

The Government acknowledges (Br. at 17-19) that by all traditional standards the fingerprint evidence must be sup-

pressed. However, despite this fact, the argument on appeal, consequently based on no more than wishful thinking, is that the evidence is admissible because (1) Alesi acted in "good faith" and (2) he did not even suspect that he would find evidence of a bank robbery.[22] Incredibly, the Government relies for these two propositions on United States v. Karathanos, supra, where this Court rejected the very contentions urged here.

In Karathanos, the argument was that because the agents had made a "good faith" application to a magistrate, the latter's mistake in signing the warrant on less than probable cause should not preclude the use of the evidence so

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[22]The Government is encouraged in this endeavor by its perception in recent cases in the Supreme Court and this Court that the death knell has been sounded for the exclusionary rule. That is clearly not the fact. Most recently, in Stone v. Powell, 44 U.S.L.W. 5313, 5321 (July 6, 1976), the Supreme Court reaffirmed the viability of the rule, stating:

> ... We have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the exclusionary rule at trial and its enforcement on direct appeal....

See also United States v. Karathanos, supra.

obtained. Apart from the question of whether or not the agents there had in fact acted in good faith, this Court reiterated that good faith does not vitiate the function of the exclusionary rule:

> ... [N]o purpose is served by pursuing the government's suggestion, since decisions of the Supreme Court outlining the scope of the exclusionary rule offer no support for limiting it in this manner. The landmark discussions of the rule clearly regard it as a remedy to be applied whenever the search in question does not comply with Fourth Amendment standards, regardless of the presence or absence of a warrant and the good or bad faith of the police officers. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).
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> United States v. Karathanos, supra, 531 F.2d at 33.

That is particularly so in this case where Alesi's good faith in stopping Magda is nowhere established. On the contrary, Judge Carter explicitly found that the primary motivation for the stop was the observation of an innocent encounter between a "white man" and a "black man" in a high crime area. This fact, so obviously inadequate to provide justification for the stop, casts grave doubt upon the Government's gratuitous assertions of good faith. Indeed, on these facts, there remains the distinct possibility that the stop was made in bad faith because it was a racially motivated intent to harrass.

The Government's second contention is that since Alesi

did not expect to find evidence of a bank robbery when he stopped Magda, the evidence is admissible because it is not "closely connected" to the reason for the unlawful stop. This argument is a clear perversion of the exclusionary rule. In essence, the Government asks this Court to hold that the fewer the reasons, and consequently the less the justification for the stop, the greater the latitude the prosecution should have to introduce the evidence uncovered during the illegal intrusion. To state this argument is to reveal its absurdity.[23]

The "close connection" test relates not as the Government would have it to the reasons for the illegal search, but rather to what the illegal search turns up. So long as the evidence objected to has come to light by exploitation of the primary illegality, it must be suppressed. Wong Sun v. United States, supra; United States v. Karathanos, supra; United States v. Tane, 329 F.2d 848 (2d Cir. 1964). Judge Carter was correct when he suppressed the fingerprint evidence as a fruit of the illegal stop.

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[23]So, too, is the Government's suggestion that sufficient sanction is found by excluding the evidence from the state prosecution. This argument was rejected by the Supreme Court sixteen years ago in Elkins v. United States, 364 U.S. 206 (1960).

CONCLUSION

For the foregoing reasons, the order of the District Court must be affirmed.

Respectfully submitted,

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